No. 731

In the Supreme Court of the United States

OCTOBER TERM, 1968

ALABAMA STATE TEACHERS ASSOCIATION, ET AL.,

APPELLANTS,

v.

ALABAMA PUBLIC SCHOOL AND

COLLEGE AUTHORITY, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION TO AFFIRM

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Appellees, Members of the Board of Trustees and The Board of Trustees of Auburn University, pursuant to Rule 16 of the Revised Rules of The Supreme Court of The United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion, judgment and decree of the three-judge District Court from which this appeal is taken (R. 695) is reported at 289 F. Supp. 784.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1253.

QUESTION PRESENTED

Whether the District Court erred in denying an injunction to prevent the expansion, establishment, and operation at Montgomery, Alabama, of a branch of Auburn University, a fully accredited, large and broad-based state supported university, which branch would provide needed educational resources and opportunities on a nondiscriminatory basis to students, white and Negro; and in holding that the statute providing initial funds for such a branch was not unconstitutional on its face or as applied to Appellants.

STATEMENT

This is a direct appeal from the final judgment and decree entered on July 26, 1968, by a three-judge Court convened to hear the cause pursuant to 28 U. S. C. § § 2281 and 2284.

The complaint sought to prevent the establishment at Montgomery, Alabama, of a branch of Auburn University (R. 1-23). At the beginning of the hearing on the merits on May 2, 1968, counsel for Appellants specifically abandoned all challenges to the constitutionality of the funding and enabling statute except "the constitutionality" of Alabama Act 403, Regular Session, 1967, "as it applies" (R. 708).

Hearing of testimony and receipt of depositions and exhibits was completed on May 2, 1968, and the cause was taken under submission (R. 927). On July 26, 1968, the three-judge Court handed down its unanimous opinion, judgment, and decree, holding that the challenged Act "is not unconstitutional on its face or as applied to plaintiffs," and denying the relief sought by plaintiffs (R. 695-703). This appeal, and an appeal to the United States Court of Appeals for the Fifth Circuit, followed (R. 933, 935).

ARGUMENT

The decision of the three-judge District Court is plainly correct. It held that, on the record made, the funding and establishment of a branch of Auburn University in Montgomery, Alabama, was not unconstitutional. The unanimous opinion of the three-judge Court evinces careful study, detailed analysis, and a full consideration of the testimony heard orally by the Court and the lengthy depositions and voluminous exhibits presented at the hearing.

The record is wholly lacking in any evidence to substantiate Appellants' unsupported claims that the take over of the University of Alabama Center in Montgomery by Auburn University, and its expansion into a full-blown, degree-granting, branch of Auburn University would somehow amount to racial discrimination. The Court observed (R. 701) that the Auburn Branch in Montgomery is not designed to be, and will

not be, a white school or a Negro school, *"but just a school."*

The establishment of the Auburn Branch at Montgomery "is by no means unique, but rather is consistent with a definite trend of the last few decades in American higher education whereby institutions more and more are bringing to large population centers the kind of academic opportunities and educational vigor so vital to the cultural, professional and business components of our developing urban life." (From Plaintiffs' (Appellants) Exhibit 1 to Deposition of Holman Head, R. 191, R. 273).[1]

It is a common practice throughout the country for large public colleges and universities to make their programs available where the need exists.[2] The need is determined by the Legislative Branch and imple-

[1] "There are more than 250 such permanent branches of State Universities and land-grant colleges in the United States. Along with community and junior colleges, these institutions are making it possible and practical for thousands of students to continue their education beyond high school by bringing college within easier reach.

"As Herman B. Wells, chancellor of Indiana University and its president for 25 years, recently stated, 'branch campuses are a good idea because they are fully integrated into the parent institution and gain the benefits of close association with the larger establishment, sharing its resources, prestige, and academic maturity, while developing as a smaller and more locally oriented educational institutions'."

(Plaintiffs' (Appellants) Exhibit 1 to Head Deposition, R. 191, R. 273).

[2] "A good example of this was the 1966 decision of the U. S. Congress to establish a new college in Washington, D. C. to be known as City Federal College. This new public institution will open in September and has been appropriated $40 million for the site and construction costs. This new college was established by

mented by University Administrations. Cf. *Berman v. Parker*, 348 U. S. 26, 33, a case involving the District of Columbia Redevelopment Act, where this Court said, "We do not sit to determine whether a particular . . . project is or is not desirable." In *Harrison-Halstead Com. Group v. Housing & Home Finance*, 310 F. 2d 99, 105, (a case involving location of a branch of the University of Illinois in Chicago, Chicago Campus Project) the Court said: "Courts have consistently denied the standing of citizens to challenge the choice made by public authorities between different and competing public uses."

The funding of the take over and expansion of the Montgomery Center was a matter within the competency of the State Legislature.

The leading Alabama case involving the location of higher education facilities is *Stevens v. Thames*, 204 Ala. 486, 86 So. 77, which was an action against The Trustees of the University of Alabama and the officials of The University of Alabama to enjoin the removal from Mobile to the University of Alabama of the Mobile Medical College facilities. The Alabama Supreme Court said: "This, however, is a question which must address itself to the lawmaking body, and with which the Court cannot deal."

Congress rather than expanding an already established institution, Howard College, a predominately Negro institution. Also located in Washington are a number of other institutions, both public and private, some predominately white and predominately Negro."

(From Plaintiffs' (Appellants) Exhibit 20 to deposition of Dr. Philpott, R. 89, R. 151, 153).

Courts do not fund or locate post offices, military bases, dams, harbors, public power plants, universities, or highways.

The record clearly sets forth the educational needs in the Montgomery area. Auburn University, administered through its Board of Trustees, is a broad-based, fully accredited university with programs leading to Doctorate degrees. It has a faculty of over 850, and is already operating the former University of Alabama Center, and is carrying on a graduate program under a commitment to the Air University located at Maxwell Air Force Base in Montgomery (R. 773, R. 802), a program which was recently handled by George Washington University (R. 220).[8] Auburn's Montgomery Branch will provide expansion of educational opportunity for students of all races and creeds, "without any equivocation" (R. 773, R. 804).

Auburn University has, as observed by the Court, dealt with the racial integration matter fairly, and in good faith (R. 702). In *Franklin v. Parker*, 223 F. Supp. 724, modified and affirmed, 331 F. 2d 841, the issue was academic qualification. Judge Johnson, who heard and decided *Franklin* in the District Court, and who authored the opinion in this case, is intimately familiar with Auburn's record (R. 702). Indeed, Auburn University has been progressively active in programs, fully integrated, dealing with desegregation in

[8] "The staff of the Air University is anxious to expand the educational programs for officers and airmen at Maxwell and Gunter Air Force Bases." (Plaintiffs' (Appellants) Exhibit 1, to Head Deposition, R. 191, R. 292). "They are currently operating with outside institutions including George Washington University. They would prefer having a total and expanded program dealing with a single university" (R. 314).

southern schools (R. 807). "We have been operating this program under a federal grant for the last four years, and it will be extended for next year" (R. 807). Auburn's administration has dealt with this matter on campus as professional educators doing a job. The Montgomery program will be an educational program, for all students, white and Negro (R. 808).

Appellants (plaintiffs below) did not make out a case for declaratory or injunctive relief. Indeed, the record negatives their vague and unsupported assertions of contravention of the Constitution of the United States. The record clearly sets forth the need and desirability for the establishment of the Auburn University Branch at Montgomery, bringing expanded educational opportunities to where the people are, and for the benefit of all citizens, Negro and white, utilizing the presently available, substantial facilities of the University of Alabama (now Auburn) Montgomery Center, and continuing and expanding them through a broad-based, large university, with a present faculty resource of over 850 members. The need for such a branch has been legislatively determined, is supported by experience and studies of both university and civic organizations, and funds for a large campus site have been locally assured (R. 705). All this is to be implemented by the knowledge, experience, facilities, manpower, and resources of Auburn University which has already demonstrated an affirmative approach to making the benefits of educational opportunity available to all, without distinction as to the race or color of anyone seeking the benefits.[4]

[4] Plaintiffs' (Appellants) Exhibit 3 (R. 192) to the Head Deposition, contains a copy of an editorial of February 23, 1968,

Green v. County School Board of New Kent County, 391 U. S. 430, referred to by Appellants and the three-judge Court (R. 702) does not hold that the bringing of fully racially integrated educational opportunities to a community is unconstitutional. The Auburn University Branch at Montgomery will bring wide educational opportunities to a population center, where education may be pursued by thousands of people, white and Negro, many of whom would otherwise not get an education at a higher educational level (Testimony

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from *The Montgomery Advertiser* (R. 516) which says: "The fact that Montgomery already has a state-supported, four-year college, Alabama State, does not confer squatter's rights. The city needs the kind and quality of education which the center can provide and doubtless many qualified Negro students will avail themselves of its courses. However, we doubt it will put Alabama State out of business or Huntingdon or Alabama Christian.

"If this competition puts Alabama State on its mettle, fine. State students will surely benefit. We realize that competition has become, in some circles, an ugly word, but we are old-fashioned enough to believe it's a good thing.

"The suit makes no sense. We hope that the three-judge court requested to hear it will find that a new facility, which would be a great boon to both races in the city, and which will come into being with its doors open to all who are qualified, is not a social evil for which there is a judicial remedy.

"If a new college for Montgomery is discrimination, then the word has lost the last shred of meaning."

Plaintiffs' same exhibit (R. 519) contains a March 1, 1968, editorial in *The Birmingham News* which says: "With the selection of a location in Montgomery for a four-year branch of Auburn University, the structure of state-supported urban education in Alabama nears completion. This is an important step in the educational life of our state, and one which should pay dividends many times over in the coming years."

of Dr. Levi Watkins, President of Alabama State College, R. 854, 855, 857).

The District Court significantly observed:

> "We believe that an effective beginning has been made at Auburn to dismantle the racial characteristics of that school system and that, as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education. If the Auburn branch at Montgomery is administered as 'just a school,' as we are assured it will be and as we are confident it will be, our conclusions as herein outlined will receive significant confirmation." (R. 703), 289 F. Supp. 784, 790.

CONCLUSION

The legislation funding the proposed Auburn Branch became law September 8, 1967 (R. 22). The Board of Trustees of Auburn University accepted the assignment and plans went forward toward establishment of the Branch, and on February 21, 1968, this action was filed casting a cloud over the development. The case has been fully developed and heard, and a three-judge Court has unanimously spoken. It is respectfully submitted that Appellants, within the bounds of the present record, present no substantial question, and that the judgment and decree of the District Court should be affirmed, so that Auburn University may get on with the business of completing its

branch campus and educating students, white and Negro, in the Montgomery area.

Respectfully submitted,

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